

Announcement 2012-46

This document provides notice and information regarding a temporary expansion of eligibility for the Voluntary Classification Settlement Program (VCSP) that will be available through June 30, 2013. The temporary eligibility expansion makes a modified VCSP available to taxpayers who would otherwise be eligible for the current VCSP but have not filed all required Forms 1099 for the previous three years with respect to the workers to be reclassified. Eligible taxpayers that take advantage of this limited, temporary eligibility expansion agree to prospectively treat workers as employees and will receive partial relief from federal employment taxes.

I. PURPOSE

The Internal Revenue Service (IRS) has developed a new, temporary initiative to permit taxpayers who are otherwise eligible for the VCSP, but have not filed all required Forms 1099 for the previous three years with respect to the workers to be reclassified, to apply for a modified version of the VCSP, the VCSP Temporary Eligibility Expansion. The VCSP Temporary Eligibility Expansion is available through June 30, 2013.

Like the VCSP, the VCSP Temporary Eligibility Expansion permits eligible taxpayers to voluntarily reclassify their workers as employees for federal employment tax purposes and obtain relief similar to that obtained through the current Classification Settlement Program (CSP). The VCSP Temporary Eligibility Expansion is optional and provides taxpayers with an opportunity to voluntarily reclassify their workers as employees for future tax periods with limited federal employment tax liability for the past nonemployee treatment. Payment under the VCSP Temporary Eligibility Expansion is higher than the payment under the VCSP, but the benefits are otherwise the same for taxpayers that want to voluntarily reclassify their workers but have not filed all required Forms 1099 for those workers. To participate, the taxpayer must meet certain eligibility requirements, apply to participate in the VCSP Temporary Eligibility Expansion, and enter into a closing agreement with the IRS.

II. BACKGROUND

Whether a worker is performing services as an employee or as an independent contractor depends upon the facts and circumstances and is generally determined under the common law test of whether the service recipient has the right to direct and control the worker as to how to perform the services. In some

factual situations, the determination of the proper worker classification status under the common law may not be clear. For taxpayers under IRS examination, the current CSP is available to resolve federal employment tax issues related to worker misclassification if certain criteria are met. The CSP permits the prospective reclassification of workers as employees, with reduced federal employment tax liabilities for past nonemployee treatment. The CSP allows businesses and tax examiners to resolve the worker classification issues as early in the administrative process as possible, thereby reducing taxpayer burden and providing efficiencies for both the taxpayer and the government.

In order to facilitate voluntary resolution of worker classification issues and achieve the benefits of increased tax compliance and certainty for taxpayers, workers, and the government, the IRS determined that it would be beneficial to provide taxpayers with a program that allows for voluntary reclassification of workers as employees outside of the examination context and without the need to go through normal administrative correction procedures applicable to employment taxes. Accordingly, the VCSP was established on September 21, 2011, through Announcement 2011-64, 2011-41 I.R.B. 503. In response to feedback from taxpayers and taxpayer representatives, the VCSP is modified under Announcement 2012-45, 2012-51 I.R.B. 724, to (1) permit a taxpayer under IRS audit, other than an employment tax audit, to be eligible to participate in the VCSP; (2) clarify the current eligibility requirement that a taxpayer that is a member of an affiliated group within the meaning of section 1504(a) is not eligible to participate in the VCSP if any member of the affiliated group is under employment tax audit; (3) clarify that a taxpayer is not eligible to participate in the VCSP if the taxpayer is contesting in court the classification of the class or classes of workers from a previous audit by the IRS or the Department of Labor; and (4) eliminate the requirement that a taxpayer agree to extend the period of limitations on assessment of employment taxes as part of the VCSP closing agreement with the IRS.

To be eligible under the VCSP, a taxpayer must meet certain requirements, including having consistently treated the workers as nonemployees and having filed all required Forms 1099, consistent with the nonemployee treatment, for the previous three years with respect to the workers to be reclassified. Taxpayers that do not qualify under the VCSP because they have not filed all required Forms 1099 for the previous three years requested a similar program. The IRS decided to provide this limited, temporary eligibility expansion through June 30, 2013, to permit taxpayers that have not filed all required Forms 1099 to agree to voluntarily reclassify their workers prospectively and file and furnish any required Forms 1099 with respect to the workers being reclassified for the previous three years.

III. ELIGIBILITY

The VCSP Temporary Eligibility Expansion is available for taxpayers who want to voluntarily change the prospective classification of their workers. The program applies to taxpayers who are currently treating their workers (or a class of workers) as independent contractors or other nonemployees and want to prospectively treat the workers as employees. To be eligible, a taxpayer must have consistently treated the workers as nonemployees. The taxpayer cannot currently be under employment tax audit by the IRS. A taxpayer that is a member of an affiliated group within the meaning of section 1504(a) is considered to be under employment tax audit for purposes of the VCSP Temporary Eligibility Expansion if any member of the affiliated group is under employment tax audit. Furthermore, the taxpayer cannot be currently under audit concerning the classification of the class or classes of workers by the Department of Labor or by a state government agency.

A taxpayer who was previously audited by the IRS or the Department of Labor concerning the classification of the class or classes of workers is eligible for the VCSP Temporary Eligibility Expansion if the taxpayer has complied with the results of that audit and is not currently contesting the classification in court.

In addition, in order to be eligible to participate in the VCSP Temporary Eligibility Expansion, a taxpayer must furnish to the workers and electronically file all required Forms 1099, consistent with the nonemployee treatment, with respect to the workers being reclassified for the previous three years prior to executing the VCSP Temporary Eligibility Expansion closing agreement with the IRS. Taxpayers must electronically file such Forms 1099 in accordance with IRS instructions, which will be provided once the IRS has reviewed the application and verified that the taxpayer is otherwise eligible for the VCSP Temporary Eligibility Expansion, as indicated in Section V, Application Process.

Taxpayers seeking to participate in the VCSP Temporary Eligibility Expansion must submit an application, as indicated below in Section V, Application Process, on or before June 30, 2013.

IV. EFFECT OF THE VCSP TEMPORARY ELIGIBILITY EXPANSION

A taxpayer who participates in the VCSP Temporary Eligibility Expansion agrees to prospectively treat the class or classes of workers identified in the application as employees for future tax periods. In exchange, the taxpayer pays 25 percent of the employment tax liability that would have been due on compensation

paid to the workers being reclassified for the most recent tax year if those workers were classified as employees for such year, determined under the reduced rates of section 3509(b); pays a reduced penalty, as discussed below, for unfiled Forms 1099 for the previous three years with respect to the workers being reclassified; is not liable for any interest and penalties on the liability; and is not subject to an employment tax audit with respect to the worker classification of the class or classes of workers for prior years. The taxpayer must certify as part of the VCSP Temporary Eligibility Expansion closing agreement with the IRS that it has furnished to the workers and has electronically filed all required Forms 1099 for the previous three years with respect to the workers being reclassified.

Under the VCSP Temporary Eligibility Expansion, the penalty for unfiled Forms 1099 is graduated, based on the number of required Forms 1099 that were not filed for the previous three years with respect to the workers being reclassified, up to a maximum amount. The worksheet provided with this announcement provides further details regarding how the penalty is calculated.

V. APPLICATION PROCESS

Eligible taxpayers who wish to participate in the VCSP Temporary Eligibility Expansion must submit an application on or before June 30, 2013, for participation in the program using Form 8952, *Application for Voluntary Classification Settlement Program (VCSP)*. However, taxpayers seeking to participate in the VCSP Temporary Eligibility Expansion should write "VCSP Temporary Eligibility Expansion" at the top of Form 8952.

Taxpayers seeking to participate in the VCSP Temporary Eligibility Expansion must complete all parts of Form 8952, with the following modifications: (1) Taxpayers should put a line through Part V, Line A3, to indicate that Taxpayer has not satisfied all Form 1099 requirements for each of the workers for the 3 preceding calendar years ending before the date of the application; and (2) Taxpayers should not complete Part IV, Payment Calculation, of Form 8952. Instead, taxpayers should use the worksheet provided in this announcement to calculate their payment under the VCSP Temporary Eligibility Expansion. Taxpayers should attach the completed worksheet provided in this announcement to Form 8952.

Information about the VCSP Temporary Eligibility Expansion and the application is available on www.irs.gov. Along with the application, the taxpayer may provide the name of a contact or an authorized representative with a valid Power of Attorney (Form 2848). The IRS will contact the taxpayer or

authorized representative with instructions on how to electronically file Forms 1099 once it has reviewed the application and verified that the taxpayer is otherwise eligible. The IRS retains discretion whether to accept a taxpayer's application for the VCSP Temporary Eligibility Expansion. The taxpayer must contact the IRS to provide confirmation that the taxpayer has electronically filed Forms 1099 and furnished the forms to the workers being reclassified. The IRS will then contact the taxpayer to complete the process. Taxpayers whose application has been accepted enter into a closing agreement with the IRS to finalize the terms of the VCSP Temporary Eligibility Expansion and must simultaneously make full and complete payment of any amount due under the closing agreement.

VI. DRAFTING INFORMATION

The principal drafter of this announcement is Ligeia M. Donis of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt & Government Entities). For further information regarding this announcement, contact Ligeia Donis at 202-622-6040 (not a toll-free call).